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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,

Petitioners,

v.

MICHAEL F. BRAUN and IAN BRAUN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION BY NATIONAL ASSOCIATION FOR INFORMATION SERVICES FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

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SOLDIER OF FORTUNE MAGAZINE, INC.
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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION BY NATIONAL ASSOCIATION FOR INFORMATION SERVICES FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

The National Association for Information Services ("NAIS") is a trade association which represents a broad spectrum of participants in the business of telephonic information services. Telephonic information services are electronic

communications carried out through 900-number and 800-number calls designed to educate consumers on a host of topics, including products and personal services. NAIS respectfully moves for leave to file the annexed brief as *amicus curiae* in support of Petitioners, in accordance with Rule 37 of the Rules of this Court. The Petitioners have consented to the filing of this brief; Respondents refused to give their consent.

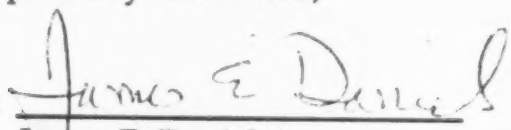
The Eleventh Circuit has imposed a duty of care on "publishers" to eliminate speech in classified advertising which poses a "substantial danger of harm to the public." NAIS is deeply concerned that the holding might have a substantial adverse impact on its members and on the continued growth of the industry it represents. The annexed brief shows that telephonic information services constitute a rapidly-developing, new form of communication between consumers and

suppliers/advertisers of services and products. The Eleventh Circuit did not consider any of the unique aspects of this field in burdening "publishers" with a duty to suppress certain speech. The Eleventh Circuit decision provides no guidance to participants in the field on how they could, as a practical matter, conform to the duty it may impose. Nevertheless, the court chose to formulate its holding in broad terms, applying it to "publishers" without any stated limitation. In so doing, the court has exposed participants in the telephone information services field to the prospect of burdensome litigation over the speech they convey and forces them to consider adoption of means to minimize that threat. The annexed brief expresses the concern of NAIS that the Eleventh Circuit holding will therefore have a deleterious impact on speech and stifle normal development in this emerging industry.

WHEREFORE, it is respectfully requested that NAIS's motion for leave to file the annexed brief *amicus curiae* be granted.

Dated: New York, New York
December 9, 1992

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR NATIONAL ASSOCIATION FOR INFORMATION SERVICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

National Association for Information Services respectfully submits this brief as *amicus curiae* in support of the prayer of Petitioners Soldier of Fortune Magazine, Inc. and Omega Group, Ltd. that this Court issue a writ of certiorari to review

the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 13, 1992, reported at 968 F.2d 1110 and reprinted in Petitioners' Appendix at 1a-24a.[1]

THE INTERESTS REPRESENTED BY THIS AMICUS CURIAE

The National Association for Information Services ("NAIS") was formed in 1990 to represent a broad spectrum of participants in the business of telephonic information services, a new but already significant segment of the communications industry.[2] Telephonic information services are electronic communications carried out through 900-number and 800-number calls which are made to

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1. References to Petitioners' Appendix shall be designated herein as "Appendix at __."

2 Richard D. Hylton, *All About Pay-Per-Call Lines; For 900 Numbers, the Racy Gives Way to the Respectable*, N.Y. Times, March 1, 1992, at Section C, page 8.

learn about products and personal services, to pursue promotions and sweepstakes opportunities, to reach information data banks (such as sports results, weather forecasts, restaurant listings), to participate in opinion polls, to respond to charitable solicitations, and so on through a long and rapidly growing list of program concepts. NAIS is dedicated to promoting the responsible use of telephone information services while encouraging innovation and growth.

NAIS members participate in telephonic information services at several functional levels. At the first level is the program sponsor which, for commercial or non-commercial reasons, seeks to deliver a message or provide a service through the mechanism of a telephone call. Typically, the program sponsor will itself develop the information to be provided via the telephone. The sponsor has

therefore become known in the business as the Information Provider ("IP"). In many instances, the telephonic services are an adjunct to newspapers, magazines and other print publications and open up channels of direct communication between readers and IPs. At the second level of activity are organizations which act as intermediaries between the IP and the common carrier telephone systems. Those entities, known as Service Bureaus, carry out a wide variety of tasks. They handle the telephone calls made in response to the IP's message and process the monies collected by the telephone companies. At the third functional level are the telephone systems, the interexchange and local exchange carriers which provide the electronic communications linkages and associated billing and collection services. Roles at these different

functional levels are constantly evolving in this still infant industry.

The Eleventh Circuit has held that a "publisher" can be negligent in releasing certain speech to the public. The interests of the traditional print-publisher regarding that decision are addressed by the briefs submitted by the Petitioners and other *amici*. NAIS submits this brief because its technologically distinct communications industry might also be affected in its critically important, formative years by the Eleventh Circuit's holding.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The Eleventh Circuit did not consider whether the duty of care imposed on publishers in disseminating speech extended beyond the print medium into the new field of telephone information services. It gave no practical guidance

on how participants in this field could shoulder such a duty. Nevertheless, the court chose to state its rule in the broadest terms, leaving entities which might be deemed "publishers" in the telephone information services industry in the position of having to shape their business operations to minimize the threat of oppressive litigation. Thus, the Eleventh Circuit rule will burden free speech. This Court should overturn the holding below or clarify its scope to the narrowest possible application.

Argument

Speech relayed through telecommunications services is entitled to the full protection of the First Amendment. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989). Any rules that would punish or limit speech must be closely examined to ensure that they are appropriately

fashioned to meet the unique features of the communications field to which they are being applied: "Each method [of expression] tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). Nevertheless, certain courts have made grievous errors in dealing with First Amendment issues when they fail to recognize that traditional principles cannot simply be imposed on new communications technologies without taking adequate account of the special characteristics of the new field. Indeed, scholars have observed that "[t]he rate of technological change has outstripped the ability of the law, lurching from one precedent to another, to address new realities. Novel communications are pressed into service while still in their infancy, and the legal system's initial encounters with these newborns have a lasting

influence." Laurence H. Tribe, American Constitutional Law §12-25 at 1007 (2d ed. 1988). Thus, in constructing standards of conduct which will have an impact on these new technologies, courts must closely examine the nature and substance of these emerging industries to determine whether the proposed rules will affect them in the desired fashion.[3]

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[3] The persisting adverse impact of regulations limiting the dissemination of information was explored by the United States Court of Appeals for the Second Circuit in considering a New York statute which prohibited certain electronic information service providers that offered data "relating to the proceedings of the Legislature" from subscribing to a state-owned computerized legislative database. Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 734 (2d Cir. 1985). In remanding for further consideration, the court noted that it was involved in an area of "rapidly developing technology and with novel and expanding forms of the exercise of the freedom of the press guaranteed by the First Amendment." Id. at 732. Although the plaintiff was the only entity then being denied a subscription under the statute, the court noted that the ultimate effect of the statute would depend on the development of the technology of communication

It would appear to be an essential premise to the Eleventh Circuit's analysis that the duty of care now imposed upon publishers will not interfere with free speech because its test is simple to apply. However, as demonstrated even within the ranks of the Eleventh Circuit panel, the literal words of a proposed advertisement do not readily enable one to separate a dangerous message from a harmless one.[4] Moreover, the difficulties of developing clear rules to distinguish negligent conduct are documented in centuries of common law precedent. The application of such amorphous rules to protected expression is fundamentally at odds with the First Amendment. Hynes v. Mayor of Oradell,

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and the commercial uses to which it might be put. Id.

[4] The dissent below concluded that the language of the subject advertisement was ambiguous. [Appendix at 24a]

425 U.S. 610, 620 (1976) (quoting Smith v. California, 361 U.S. 147, 151 (1959)) the vagueness test applies with particular force to law regarding speech because "the free dissemination of ideas may be the loser").[5]

The Eleventh Circuit did not consider the characteristics of the telephonic information services industry in extending common law negligence principles to the realm of free speech and certainly did not examine whether the telephone information services industry, as it presently exists, is equipped to isolate and eliminate communications which might be actionable as facially presenting a "substantial danger of harm." Nevertheless, although noting that the applicable state tort law required that attention be given to the

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[5] See Speiser v. Randall, 357 U.S. 513, 525 (1958) ("sensitive tools" must be employed to distinguish between legitimate and illegitimate speech).

burdens a proposed new duty would place on business operations (Appendix at 8a), the court chose to express its rule in terms of "publishers" generally.

Consequently, the Eleventh Circuit decision, even if not so intended, may have an adverse impact on the participants in this new field of communication although the facts and circumstances about it were not before the court. The broadly stated rule will undoubtedly encourage creative litigants to pursue negligence claims against persons other than print publishers. It is of little comfort that the industry can hope to succeed in convincing other courts that the Eleventh Circuit rule is narrower than it appears on its face. The unpredictability and fallibility of courts and juries, the costs of litigation, the procedural obstacles to summary judgment, and the difficulty in recovering

attorneys fees are all factors which weigh against risk-taking in the free expression of ideas.[6]

The need to cope with a new legal duty to ferret out certain anti-social speech will force industry members to make difficult, undesirable choices regarding message content. The Eleventh Circuit decision presupposes that some review of the "face" of the message must be made before any responsibility can attach. However, it gives little practical guidance on how that review is to be conducted, especially to those in a field quite unlike the print medium. Thus, rather than self-regulate message content and thereby take on a duty to others that did not previously exist, one can expect that many in the industry will attempt to insulate themselves from responsibility by refusing to

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[6] This point is thoroughly treated in the Petition at pages 13-21.

undertake any level of review. At the same time, there will be those who will seek to reduce the threat of litigation and liability by engaging in substantial self-censorship to eliminate the out-of-the-ordinary or ambiguous message and confine communications to mainstream material. To be on the safe side, the choice may be to publish only those messages which "on their face" make it "apparent" that there is not a substantial danger of harm to the public.

The Eleventh Circuit likely intended "publishers" to adopt a moderate approach between these two extremes, in which copy is reviewed to eliminate only those messages which truly (i.e., with the benefits of hindsight) pose a substantial threat of harm to the public. Even if this type of review were possible, it is simply not feasible for this burgeoning industry to install institutional

control mechanisms over these messages in order to protect the public from dangerous speech and protect itself from litigation. At the core of telephone information services technology is a voice message communicated to the caller (an "audiotext"). Through touch-tone signals that contact automated voice response systems, one can sort through a mass of available information to reach the desired area. On some programs, one can reach a live person to engage in "voice interactive" communications, either after or without listening to audiotext messages. The quantum of messages conveyed through these systems is enormous, and 800 and 900-number calls are already being made in staggering numbers.[7] Instituting procedures necessary to engage in meaningful review of all

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[7] See Hylton, *All About Pay-Per-Call Lines; For 900 Numbers the Racy Gives Way to the Respectable*, supra.

communications in keeping with the duty of care required by the Eleventh Circuit standard could make the cost of doing business prohibitively expensive for some industry members and deter entry by others.

NAIS recognizes that telephone information services, like other media, have a potential for anti-social use, and certain isolated early uses of 900-number technology tarnished the reputation of the new medium among some audiences. Mindful of that experience, the industry, through NAIS and the unilateral efforts of industry participants, is developing guidelines and standards with the aim, broadly stated, to encourage the development of a vigorous, free and multi-faceted industry through non-governmental means. NAIS is committed to a policy of self-regulation in order to maximize the public interest with the least possible governmental

intrusion in business affairs and control of speech. NAIS respectfully submits that the negligence rule created by the Eleventh Circuit will detract from this new industry's willingness to innovate and grow.

CONCLUSION

For the foregoing reasons, *Amicus* NAIS respectfully urges this Court to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Dated: New York, New York
December 9, 1992

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